# Setapak Ria Condominium JMB v Low Koon Chuan & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-128–03 OF 2017
DARRYL GOON J
3 MAY 2019

*Companies and Corporations — Lifting of corporate veil — Piercing of corporate veil — Whether corporate veil may be pierced to impose liability of corporate entity onto individuals behind it if they had no legal liability or obligation*

*Land Law — Joint management body ('JMB') — Claim — Claims by JMB for monies collected from purchasers by developer — Role played by contractor to developer — Liability of third party company onto breaches of duty by principal — Right of parties to pursue claims — Whether JMB may pursue claims on behalf of purchasers — Whether monies collected by developer ought to be passed to JMB — Strata Management Act 2013 ss 15(1) & 16 — Building and Common Property (Management & Maintenance) Act 2007 ss 4 & 5*

A total of two suits in this case were tried together being Suit 524 and Suit 128, by the time of the trial, the claim and counterclaim proceeded in Suit 128 whilst only the counterclaim in Suit 524 commenced as the main claim was struck off. In Suit 128, the plaintiff was the Joint Management Body of SRC which was established on 21 April 2013, the first and second defendant were directors and shareholders of the fourth defendant and the developer, the third defendant was a shareholder and at one point in time was a director of the fourth defendant. The fourth defendant ('AM-EL') was a company that provided condominium management services. In Suit 128, the plaintiff's claim against the defendants were for several declarations to recover monies collected by the developer through AM-EL, and subsequently by AM-EL itself, from the purchasers. These claims were predicated upon contentions that the monies collected were trust property in the hands of AM-EL. There were also allegations of fraud against the defendants in respect of the collections from the purchasers and in the application of the monies collected. The plaintiff maintained that the first, second and third defendant should be held personally liable and that the corporate veils of AM-EL and the developer must be lifted to expose them to personal liability. AM-EL made a counterclaim in Suit 128 for monies allegedly due from certain purchasers to AM-EL for services rendered which were allegedly collected by the plaintiff, the counterclaim was predicated on the fact that the monies collected by the plaintiff should be paid to the AM-EL. In Suit 524, what remained was the plaintiff's counterclaim against AM-EL for several injunctions for the delivery of information and

accounts for monies collected by AM-EL from the purchasers and a claim for payment of RM675,000 allegedly monies collected for SRC's sinking fund. It was to be noted that the developer of SRC was not made a party to this action as it had been wound up on 14 December 2011. The background facts were that the developer started selling apartment units in SRC in the early 1990's and the vacant possession of the apartments were only delivered around 1998. On 15 April 1998 the developer appointed AM-EL to manage SRC. AM-EL constituted a contractor appointed by the developer to provide services for and on behalf of the developer. When vacant possession was handed over by the developer, the purchasers were required to pay, in advance maintenance and service charges for three months and RM1,500 towards a sinking fund. The maintenance charges were paid into an account opened in the name of AM-EL whilst the sinking fund monies were paid into a different account. The apartments were delivered late, therefore liquidated and ascertained damages ('LAD') had to be paid. The developer did this in some cases by setting off against the maintenance charges in respect of the apartments concerned and the plaintiff maintained that the developer had utilised monies collected from the purchasers for maintenance towards paying some of the LAD it was liable for. There was also an allegation that loans were given at the time before the developer was wound up, to the first defendant and the husband of the third defendant out of the monies collected by AM-EL. After the developer was wound up, AM-EL continued to provide the services and payments continued to be made by individual purchasers. The JMB was incorporated on 21 April 2013, and there were no evidence that the developer complied with obligations under ss 4 and 5 of the Building and Common Property (Management and Maintenance) Act 2007 ('Act 663'). Having taken over the management of SRC, the plaintiff wanted to recoup the monies paid by the purchasers initially to the developer through AM-EL and subsequently directly to AM-EL. In relation to the counterclaim in Suit 524, the plaintiff contended that the sale and purchase agreements between the developer and the purchasers were in the form prescribed by reg 11 of the Housing Development (Control and Licensing) Regulations 1989 under the Housing Development (Control and Licensing) Act 1966 ('Schedule H contracts'), wherein these provisions did not permit the developer from passing its obligations to AM-EL. In appointing AM-EL, it was contended that the developer had evaded its obligations under the Schedule H contracts which was tantamount to a breach of the same.

**Held**, dismissing all claims and counterclaims in both suits:

(1) AM-EL was merely a contractor of the developer until the developer's winding up and was never privy to or under any of the obligations imposed by cl 16. The plaintiff was also never privy to any of this Schedule H contracts as they only came into existence later. Therefore the Schedule H contracts could not provide any legal basis for any claim to be made by the plaintiff against AM-EL (see paras 45–47).

(2) Monies collected by AM-EL were collected before the plaintiff was incorporated, therefore it could not be said that the plaintiff was the beneficiary of the monies collected, if at all, it would be the purchasers who paid AM-EL who would have any legal foundation to mount a claim against AM-EL in respect of the monies collected from them, and if there was any form of relationship in respect of the monies, it would be a contractual relationship. As AM-EL was not the developer, there was no provision in any of the legislation that conferred upon the plaintiff any right to pursue claims against a third party such as AM-EL (see paras 60–63 & 66).

(3) The objective of s 22(1) of Act 663 and ss 15 (1) and 16 of the Strata Management Act 2013 ('Act 757') was to ensure a surplus of monies collected from the purchasers were passed on to the JMB. This obligation was specifically imposed on the developer. However these provisions could not be extend to include monies collected by third party contractors other than the developer as defined (see paras 70–73).

(4) The court would not allow an individual or entity to evade or be concealed from a legal obligation or liability that the individual or entity bore by hiding behind the veil of incorporation, however the concept of piercing the corporate veil was not employed for the purpose of imposing the liability of the corporate entity on the individuals behind it, if they were not under and legal liability or obligation in the first place (see paras 86 & 90).

(5) It could not be said that in the factual circumstances of this case, the plaintiff had been unjustly enriched at the expense of AM-EL. The plaintiff was merely collecting payment in order to carry out its function to, among other things, provide maintenance and management of the SRC. Its collection of payments from the purchasers was not at the expense of AM-EL. Whatever debt that may be owed by the individual purchasers to AM-EL, remained due and owing. It could not be extinguished by payments made to the plaintiff (see para 101).

**[Bahasa Malaysia summary**

Dua guaman dalam kes ini dibicarakan iaitu Guaman 524 dan Guaman 128, semasa perbicaraan, tuntutan dan tuntutan balas dalam Guaman 128 diteruskan, manakala hanya tuntutan balas dalam Guaman 524 diteruskan kerana tuntutan utama telahpun dibatalkan. Dalam Guaman 128, plaintif merupakan Badan Pengurusan Bersama SRC yang ditubuhkan pada 21 April 2013, defendan pertama dan kedua merupakan pengarah dan pemegang saham defendan keempat dan pemaju, defendan ketiga merupakan pemegang saham dan pada satu masa pengarah defendan keempat. Defendan keempat ('AM-EL') merupakan satu syarikat yang memberikan perkhidmatan pengurusan kondominium. Dalam Guaman 128, tuntutan plaintif terhadap

defendan adalah untuk beberapa deklarasi untuk mendapatkan semula wang yang dikutip oleh pemaju melalui AM-EL, dan kemudiannya oleh AM-EL sendiri, daripada pembeli. Tuntutan ini berasaskan pengataan bahawa wang yang dikutip merupakan harta amanah dalam milikan AM-EL. Juga wujud tuduhan fraud terhadap defendan-defendan berkaitan dengan wang yang dikutip daripada pembeli dan penggunaan wang yang dikutip. Plaintif menegaskan bahawa defendan pertama, kedua dan ketiga haruslah bertanggungjawab secara peribadi dan bahawa tadbir permerbadanan AM-EL haruslah diangkat agar mereka boleh dipersalahkan secara peribadi. AM-EL membuat tuntutan balas dalam Guaman 128 untuk wang yang kononnya terhutang kepada AM-EL untuk perkhidmatan yang diberikan dan kononnya dikutip oleh plaintif. Tuntutan balas tersebut berasakan fakta yang wang yang dikutip oleh plaintif hendaklah dibayar kepada AM-EL. Dalam Guaman 524, apa yang tinggal adalah tuntutan balas plaintif terhadap AM-EL untuk beberapa injunksi untuk penyerahan maklumat dan akaun untuk wang yang dikutip oleh AM-EL daripada pembeli dan tuntutan untuk pembayaran RM675,000 untuk wang yang kononnya dikutip untuk dana terikat SRC. Ianya harus diambil maklum bahawa pemaju SRC tidak dijadikan pihak dalam tindakan ini kerana ianya telah digulungkan pada 14 Disember 2011. Fakta kes ini adalah pemaju telah mula menjual unit pangsapuri dalam SRC seawal 1990-an dan milikan kosong hanya diserahkan kepada perayu sekitar 1998. Pada 15 April 1998, pemaju melantik AM-EL untuk menguruskan SRC. AM-EL merupakan kontraktor yang dilantik oleh pemaju untuk memberikan perkhidmatan bagi pihak pemaju. Apabila milikan kosong diserahkan oleh pemaju, pembeli dikehendaki membayar sejumlah kerugian ('LAD'). Pemaju telah melakukan ini dengan cara dalam beberapa kes dengan menolak daripada pembayaran caj penyelenggaraan berkenaan dengan pangsapuri yang terbabit dan plaintif menegaskan bahawa pemaju telah mengguna wang yang di kumpul daripada pemaju untuk penyelenggaraan untuk membayar sebahagian daripada LAD tersebut. Terdapat juga tuduhan bahawa pinjaman diberikan pada masa sebelum pemaju digulungkan, kepada defendan pertama dan suami defendan ketiga daripada wang yang di kumpul dari AM-EL. Selepas pemaju digulungkan, AM-EL terus memberikan perkhidmatan dan bayaran masih dibuat oleh pembeli. JMB ditubuhkan pada pada 21 April 2013, dan tiada keterangan yang menunjukan pemaju telah memenuhi tanggungjawabnya di bawah ss 4 dan 5 Akta Bangunan dan Harta Bersama (Penyengaraan dan Pengurusan) 2007 ('Akta 663'). Setelah mengambil alih pengurusan SRC, plaintif hendak mendapatkan semula wang yang dibayar oleh pembeli, pada mulanya kepada pemaju melalui AM-EL dan kemudiannya secara terus kepada AM-EL. Berkenaan dengan tuntutan balas dalam Guaman 524, plaintif mengatakan bahawa perjanjian jual beli antara pemaju dan pembeli adalah dalam bentuk sepertimana diperuntukkan peraturan 11 Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan di bawah Akta Pemajuan Perumahan (Kawalan dan Perlesenan) ('kontrak Jadual H'), yang mana peruntukan ini tidak membenarkan pemaju daripada memberikan

A tanggungjawabnya kepada AM-EL, ianya di hujahkan bahawa pemaju telah mengelak tanggungjawabnya di bawah kontrak Jadual H yang merupakan pelanggaran yang sama.

B **Diputuskan,** mengetepikan semua tuntutan dan tuntutan balas dalam kedua-dua saman:

(1) AM-EL hanya merupakan kontraktor pemaju sehingga pemaju digulungkan dan tidak pernah mengetahui atau termaktub kepada mana-mana tanggungjawab yang ditetapkan oleh klausa 16. Plaintif juga C tidak pernah mengetahui kepada mana-mana kontrak Jadual H kerana ianya hanya wujud kemudian. Oleh yang demikian, kontrak Jadual H tidak boleh memberikan apa-apa asas undang-undang untuk apa-apa tuntutan dibuat oleh plaintif terhadap AM-EL (lihat perenggan 45–47).

D (2) Wang yang dikutip oleh AM-EL telah dikutip sebelum penubuhan plaintif, oleh itu, ianya tidak boleh dikatakan bahawa plaintif merupakan benefisiari wang yang dikumpul, jikalau sekalipun, ianya adalah pembeli yang membayar AM-EL yang mempunyai apa-apa asas undang-undang untuk memulakan tuntutan terhadap AM-EL berkaitan dengan wang E yang dikumpul dari mereka, dan sekiranya wujud apa-apa hubungan berkaitan dengan wang tersebut, ianya merupakan hubungan kontraktual. Memandangkan AM-EL bukan pemaju, tiada peruntukan dalam mana-mana undang-undang yang memberikan hak kepada plaintif untuk meneruskan apa-apa tuntutan terhadap pihak ketiga F seperti AM-EL (lihat perengan 60–63 & 66).

(3) Matlamat s 22(1) Akta 663 dan ss 15(1) dan 16 Akta Pengurusan Strata 2013 ('Akta 757') adalah untuk memastikan lebihan wang yang dikumpul dari pembeli diberikan kepada JMB. Tanggungjawab ini secara khususnya diletakkan pada pemaju. Namun, peruntukan ini tidak G boleh dipanjangkan untuk melibatkan wang yang dikumpul oleh kontraktor pihak ketiga selain daripada pemaju sepertimana ditakrifkan (lihat perenggan 70–73).

(4) Mahkamah tidak akan membenarkan satu individu atau entiti untuk H mengelak atau dilindungi daripada tanggungjawab undang-undang atau liabiliti yang diletakkan pada individu atau entiti tersebut dengan menyorok disebalik tadbir pemerbadanan, namun konsep menyelak tadbir pemerbadanan tidak boleh digunakan untuk tujuan meletakkan liabiliti entiti korporat kepada individu disebaliknya, jikalau mereka I tidak berada dibawah apa-apa liabiliti atau tanggungjawab undang-undang pada asalnya (lihat perenggan 86 & 90).

(5) Ianya tidak boleh dikatakan berdasarkan fakta keadaan kes ini, bahawa plaintif telah secara tidak adil dikayakan dengan menjejaskan AM-EL. Plaintif hanya sekadar mengumpul bayaran dengan tujuan untuk

menjalankan fungsinya untuk, antara yang lain, memberikan penyelengaraan dan pengurusan SRC. Pengumpulan bayarannya daripada pembeli bukan menjejaskan AM-EL. Apa-apa hutang yang terhutang daripada pembeli individu kepada AM-EL, kekal terhutang. Ianya tidak boleh dibatalkan dengan bayaran yang dibuat kepada plaintif (lihat perenggan 101).]

**Notes**

For a case on joint management body ('JMB') in general, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3911.

For cases on piercing of corporate veil, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 564–569.

**Cases referred to**

*Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, FC (refd)

*Gilford Motor Co Ltd v Horne* [1933] Ch 935, Ch D (refd)

*Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

*Jones and Another v Lipman and Another* [1962] 1 All ER 442, Ch D (refd)

*Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Berhad* [2014] 2 MLJ 518; [2014] 5 CLJ 851, CA (refd)

*Prest v Petrodel Resources Ltd and others* [2013] 2 AC 415, SC (refd)

*Prest v Prest and others* [2013] 4 All ER 673, SC (folld)

*Salomon v A Salomon & Co Ltd* [1897] AC 22, HL (refd)

*Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529, FC (refd)

**Legislation referred to**

Building and Common Property (Maintenance and Management) Act of 2007 (repealed by the Strata Mnagement Act 2013) ss 4, 5, 19, 20, 20(3), 22(1)

Housing Development (Control and Licensing) Act 1966

Housing Development (Control and Licensing) Regulations 1989 reg 11, Schedule H, cl 16

Strata Management Act 2013 ss 2, 10(4), 13, 13(3), 15(1), 15(1)(a), 16, 16(1), 38, Schedule H

*Tang Kim Choong (Mohammad Shafiee bin Afendi with him) (KC Tang & Co) for the plaintiff.*

*Yeoh Rui Ming (Sara Lee Ling Ling with her) (Mohd Imtiaz Choong & Partners) for the first and second defendants.*

*Peter Douglas Ling (Lovery Leong with him) (Peter Ling & Co) for the third and fourth defendants.*

**Darryl Goon J:**

**[1]** Setapak Ria Condominium ('SRC'), as its name describes, is a condominium development located at No 21, Jalan Mata Air 2, Off Jalan Genting Kelang, Setapak 53300 Kuala Lumpur. The development consists of 450 units of apartments. It also has a variety of facilities including several shop units, a club house, a swimming pool, sports and laundry facilities.

**[2]** This case concerns a claim by the plaintiff for monies collected from purchasers of apartments in SRC ('purchasers') by the developer of SRC and the fourth defendant, in circumstances which it was alleged, also gives rise to liability on the part of the first, second and third defendants.

**[3]** Pursuant to an order of the court in Mahkamah Tinggi Kuala Lumpur Guaman No WA-22NCVC-128–03 of 2017 ('Suit 128') dated 17 May 2017, Mahkamah Sesyen Kuala Lumpur Guaman No B52-524–08 of 2014 ('Suit 524') was transferred to the High Court and consolidated with Suit 128.

**[4]** Thus, both Suit 524 and Suit 128 were tried together. However, by the time of the trial, the action of the plaintiff in Suit 524 was struck out leaving only the counterclaim of the defendant.

**[5]** Therefore, the trial of these suits proceeded only in respect of the claim and counterclaim in Suit 128 and the counterclaim in Suit 524. The trial took a total of six days and was initially heard before a different judge.

THE PARTIES

**[6]** In Suit 128, the plaintiff is the Joint Management Body of SRC ('JMB'). The JMB was established on the 21 April 2013 (Registration No JMB 746/2013). It was established under the Building and Common Property (Maintenance and Management) Act of 2007 ('Act 663').

**[7]** There were four defendants in Suit 128. The fourth defendant is a company incorporated on 24 November 1997 ('AM-EL'). AM-EL provides condominium management services. The first and second defendants are directors and shareholders of AM-EL. The third defendant is a shareholder of AM-EL and was at one time a director. The third defendant resigned as a director on 30 June 2005 but holds the position as Sales Administrator in AM-EL.

**[8]** In Suit 524, what remained for trial was the JMB's (the tenth defendant in Suit 524) counterclaim against AM-EL (the second plaintiff in Suit 524). This counterclaim was for several injunctions for the delivery up of

information and accounts for monies collected by AM-EL from the purchasers. There was also a claim for payment of RM675,000, allegedly monies collected for SRC's sinking fund.

**[9]** As the first, second and third defendants do not feature in the counterclaim in Suit 524 they will continue to be referred to as the first, second, third defendants ie first, second, third defendants in Suit 128.

**[10]** It is also convenient at this juncture to refer to Tempamas Sdn Bhd. Tempamas Sdn Bhd was the developer of SRC. As the developer of SRC, it features somewhat prominently in this case. Tempamas Sdn Bhd will hereinafter be referred to as the ('the developer').

**[11]** The developer was however not made a party to this action as it has been wound up. It was wound up on 14 December 2011.

THE CLAIMS

**[12]** In Suit 128, the JMB's claims against the defendants were for several declarations to recover monies collected by the developer through AM-EL, and subsequently by AM-EL itself, from the purchasers. These claims were predicated upon contentions that the monies collected were trust property in the hands of AM-EL. There were also allegations of fraud against the defendants in respect of the collections from the purchasers and in the application of the monies collected.

**[13]** As for the first, second and third defendants in Suit 128, the JMB maintained that they should be held personally liable. As against the first defendant, because he was a director and substantial shareholder of the developer and is a director and shareholder of AM-EL. As against the second defendant, because the second defendant was director of the developer and is a director and shareholder of AM-EL. As against the third defendant, because the third defendant was a director of AM-EL, is still a shareholder of AM-EL and is its sales administrator. It was maintained that the corporate veils of the developer and AM-EL should be pierced to expose the first, second and third defendants to personal liability.

**[14]** In Suit 128, AM-EL has a counterclaim against the JMB. This counterclaim was for monies that were allegedly due from certain purchasers to AM-EL for services rendered. These monies were alleged to have been collected by the JMB. AM-EL's counterclaim was that these monies collected should be paid by the JMB to AM-EL.

**[15]** The JMB's counterclaim against AM-EL in Suit 524 was for several orders for the disclosure of details in regard to monies collected from the purchasers. Also sought were orders for the disclosure of AM-EL's management and financial documents including audited accounts. There was also a claim for a sum of RM675,000 allegedly collected as part of a sinking fund for SRC. Save for paras 28(c), (d), (e), (g), (i)–(iv), (h) and (n), the rest of the prayers under para 28 of the JMB's counterclaim in Suit 524 were abandoned.

THE BACKGROUND FACTS

**[16]** SRC was built by the developer in the early 1990's. As indicated above, SRC also has other facilities such as shop lots, a club house, swimming pool, squash court, cafeteria, community hall and such like. The parties have in the statement of agreed facts, referred to these as the common property.

**[17]** The developer started selling apartment units in SRC in the early 1990's. As is commonly the case, contracts for the sale of these apartments were entered into before they were actually built. It was maintained that vacant possession of the apartments sold were only delivered around 1998.

**[18]** On 15 of April 1998, the developer appointed AM-EL to manage SRC. This appointment was by way of a letter of even date. The terms of AM-EL's appointment included the following:

(a) To manage 450 Condominium units with 4 podium-levels of car parking facilities

(b) Management services comprising 3 main categories:

(i) Operations and maintenance management;

(ii) Administration; and

(iii) Finance.

(c) Commencement with effect from 1.5.1998;

(d) Setting up of management policy and system;

(e) Estimation of operation cost such as:

(i) Security;

(ii) Cleaning;

(iii) Refuse Disposal;

(iv) Pest Control;

(v) Landscaping;

(vi) Sewerage;

(vii) Lift maintenance, and others. A

(f) To collect maintenance charges;

(g) In return, AM-EL is entitled to keep 25% of the total collection including maintenance charges (currently at 13 cents per square foot) collected every month for AM-EL's upkeep and the maintenance of at least 6 employees. The payment collected shall include maintenance costs of the office and equipment and printing, electricity and telephone charges but does not includes (sic) payment for out-source service contract. B

**[19]** Based on this appointment, AM-EL was constituted a contractor appointed by the developer to provide the services mentioned, for and on behalf of the developer. C

**[20]** When vacant possession was handed over by the developer to the purchasers, they were required by the developer to pay, in advance, maintenance and service charges for three months. They were also required to pay a sum of RM1,500 (per apartment) towards a sinking fund. D

**[21]** The maintenance charges collected by the developer were then paid into an account with the Standard Chartered Bank Malaysia, account No 873–1–5622336–6. This account was opened in the name of AM-EL. Monies collected for the sinking fund were banked into a different account. The fact that monies were collected towards a sinking fund was evidenced by the notes to AM-EL's own financial statements ended 31 December for the years 1998–2004. E F

**[22]** The apartments in SRC were however delivered late by the developer. As a result, liquidated and ascertained damages ('LAD') had to be paid. This the developer did, in some cases, by way of set-off against maintenance charges due in respect of the apartments concerned. G

**[23]** It was also maintained by the plaintiff that the developer had utilised monies collected from the purchasers for maintenance towards paying some of the LAD it was liable for. H

**[24]** Documentary evidence of these payments including correspondences with claimants' solicitors, cheques and receipts, were led by the plaintiff and these payments amounted to a total of RM106,374.35. I

**[25]** There was also documentary evidence led of the developer setting off some of the purchasers' claims for LAD from the developer against monies due from these purchasers for maintenance, insurance, sewerage and water.

**[26]** It was further alleged that loans were also given to the first defendant and the husband of the third defendant out of the monies collected by AM-EL.

**[27]** Documentary evidence of these loans, such as there are, were almost entirely during the time before the developer was wound up. Documentary evidence of payments in respect of LAD were entirely during the time of the developer and these payments were made by the developer. These were all during the time AM-EL was still the developer's contractor.

**[28]** It was an agreed fact that AM-EL had collected the various payments referred to from the purchasers since 1 May 1998.

**[29]** Sometime in 1998, the SRC Owners Association ('SRCOA') was formed to represent the purchasers. It did so until sometime in 2012.

**[30]** Upon the developer being wound up on 14 December 2011, AM-EL continued to provide the services that it had been providing to the purchasers. This was not disputed. Payments continued to be made by individual purchasers to AM-EL. What were collected by AM-EL from the purchasers were maintenance charges and a sum towards a sinking fund.

**[31]** It was only on 21 April 2013, that the JMB was incorporated. The JMB was established under Act 663. Act 663 came into force on 12 April 2007. Section 4 of Act 663 provides as follows:

> 4 Establishment of a Joint Management Body
>
> (1) Where a building or land intended for subdivision into parcels has been completed —
>
> (a) before the commencement of this Act and vacant possession of the parcels has been delivered by the developer to purchasers but the management corporation has not come into existence, a Joint Management Body shall be established consisting of the developer and the purchasers upon the convening of the first meeting not later than twelve months from the commencement of this Act; and
>
> (b) on or after the commencement of this Act, a Joint Management Body shall be established consisting of the developer and the purchasers upon the convening of the first meeting not later than twelve months from the date of delivery of vacant possession of the parcels to the purchasers.
>
> (2) The Body established by subsection (1) shall be a body corporate having perpetual succession and a common seal.
>
> (3) The Body may sue and be sued in its name.
>
> (4) The Body shall comprise the developer and the purchasers.

**[32]** For the purposes of Act 663, 'Body' means the joint management body established under s 4.

**[33]** Section 4 clearly envisages the developers being part of the joint management body. However, by the time the JMB was established in 2013, the developer had already been wound up in 2011.

**[34]** In fact under s 5 of Act 663, developers were to convene the first meeting of all the purchasers. Until the joint management body is established, subject to the provisions of Act 663, developers were to be responsible for the maintenance and management of the condominium. Section 5 of Act 663 provides as follows:

> 5 Duty of developer to convene meeting
>
> (1) It shall be the duty of the developer to convene the first meeting of all purchasers.
>
> (2) The developer shall give a written notice of the first meeting to all purchasers not less than fourteen days before the meeting.
>
> (3) Without prejudice to subsection (1), if the developer fails to convene the first meeting within the specified period, the Commissioner may appoint a person to convene the first meeting of the Body within such time as may be specified by the Commissioner.
>
> (4) The developer shall, until the establishment of the Body and subject to the provisions of this Act, be responsible for the maintenance and management of the property.
>
> (5) Any developer who fails to comply with subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding three months or to both.

**[35]** However, there was no evidence that the developer complied with these obligations under Act 663.

**[36]** On 1 July 2013, the JMB took over management of SRC. There was some controversy over how this taking over was effected. It was contended by AM-EL and the third defendant that the manner of the take-over was hostile. A police report was even lodged by the third defendant. However, this controversy was not the subject matter of either Suit 128 or the counterclaim in Suit 524.

**[37]** Having taken over the management of the SRC from AM-EL, the JMB found and took over documents of AM-EL. These documents related to AM-EL's management of SRC. There were receipts for payments made by the

purchasers towards maintenance and the sinking fund, correspondences including those with the purchasers for various charges including maintenance charges, deposits for water and electricity, vouchers in respect of loans given by AM-EL to its directors and third parties. These were identified by one Kum Lee Kee, a committee member of the JMB and who testified as PW-9.

**[38]** Having taken over the management of SRC, the JMB wanted to recoup the monies paid by the purchasers initially to the developer through AM-EL and subsequently, directly to AM-EL.

**[39]** Act 663 was repealed by the Strata Management Act 2013 ('Act 757'). Act 757 came into force on 1 June 2015. By virtue of s 38, a joint management body established under Act 663 is deemed to have been established under Act 757. Section 38 provides as follows:

> 38 Existing body and committee
>
> A Joint Management Body established or a Joint Management Committee elected under the repealed Act shall be deemed to have been established or elected under this Act except that after the commencement of this Act the provisions of this Act shall apply to such a Body or Committee.

Continuity of the JMB, established under Act 663, was thus maintained.

## THE JMB'S CLAIM AND COUNTERCLAIM AGAINST AM-EL

**[40]** Both the JMB's claim in Suit 128 and its counterclaim in Suit 524 were brought in the name of the JMB qua JMB.

**[41]** The JMB contended that the sale and purchase agreements between the developer and the purchasers were in the form prescribed by reg 11 of the Housing Development (Control and Licensing) Regulations 1989 under the Housing Development (Control and Licensing) Act 1966 ('Schedule H contracts').

**[42]** Regulation 11 provides as follows:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and *where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H*. (Emphasis added.)

**[43]** Clause 16 of the statutorily prescribed Schedule H contract provides as follows:

> 16 Payment of Service Charges

(1) The purchaser shall be liable for and shall pay the service charges for the maintenance of the common property and for the services provided by the Vendor prior to the establishment of a management corporation under the Strata Titles Act 1985.

(2) ...

(3) Every written notice to the purchaser requesting for the payment of service charges from the Vendor shall be supported by a service charge statement issued by the Vendor.

**[44]** It was the JMB's contention that these provisions do not permit the developer from passing its obligations to AM-EL. In appointing AM-EL, it was contended that the developer had evaded its obligations under the Schedule H contracts which was tantamount to a breach of the same.

**[45]** The developer was the vendor of the apartments to be built in SRC. Clause 16 imposed obligations on the developer. However, insofar as AM-EL is concerned, it was merely a contractor of the developer until the latter's winding up. AM-EL, not being the developer, was never privy to or under any of the obligations imposed by cl 16.

**[46]** In any event, the JMB too was never privy to any of these Schedule H contracts. This is also not to overlook the fact that the JMB only came into existence much later, after the developer's Schedule H contracts with the purchasers had been entered into.

**[47]** Therefore, in the circumstances appertaining, the Schedule H contracts referred to by the JMB cannot provide any legal basis for any claim to be made by the JMB against AM-EL.

**[48]** When the developer was wound up on 14 December 2011, Act 663 was still in force. Provisions existed in Act 663 for the developer to maintain a building maintenance account and its duties in relation to such an account. By virtue of s 19 of Act 663, monies in such an account are not deemed to belong to the developer upon its winding up. Upon the developer being wound up, monies in the building maintenance account were to have vested in the official receiver to be applied in accordance with the provisions of Act 663.

**[49]** However, upon the developer being wound up, there was a lacuna insofar as the provision of maintenance to SRC was concerned. AM-EL having acted as agent or contractor to the developer to provide maintenance and management services, continued to do so. It could not have continued to do so as a contractor for the developer, as the latter had been wound up. Therefore

AM-EL could only have continued to provide the maintenance and management services to SRC as a principal.

**[50]** Section 20 of Act 663 provides as follows:

> 20 Prohibition on collection of charges
>
> (1) No person shall at any time collect any charges from any purchaser for the maintenance or management of any building or land intended for subdivision into parcels and common property unless —
>
> (a) a Building Maintenance Account has been opened in the name of the development area; and
>
> (b) vacant possession of the parcel purchased by the purchaser has been delivered to the purchaser.
>
> (2) Notwithstanding subsection (1), any developer of a development area which has been completed on or before the commencement of this Act and has, immediately before that date, been collecting charges for the maintenance and management of a building from the purchasers comprised in the development area may continue to do so until the Body has been established.
>
> (3) Any person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding one year or to both.'

**[51]** In relation to s 20 of Act 663, vacant possession of the apartments had been handed over. There was evidence that AM-EL had an account with the Standard Chartered Bank Malaysia, into which monies collected from the purchasers were deposited.

**[52]** However, there was also evidence that not only what was collected from the purchasers were paid by AM-EL into this account. Also paid into this account was income from other sources. What part of the monies in this account was actually from the purchasers was something the JMB could not and was not in a position to establish.

**[53]** Section 20(3) of Act 663, makes it an offence to be in breach of s 20. Section 13 of Act 757 contains a similar provision but extends it to sinking funds. Section 13(3) of Act 757 contains a provision that is similar to that in s 20(3) of Act 663. Section 13 of Act 757 provides as follows:

> 13 Prohibition on collection of moneys before accounts are opened
>
> (1) No person shall at any time collect any Charge, or contribution to the sinking fund from any purchaser for the maintenance and management of any building or land intended for subdivision into parcels and the common property unless —

(a) a maintenance account and a sinking fund account have been opened in respect of the development area; and

(b) vacant possession of the parcel purchased by the purchaser has been delivered to the purchaser.

(2) Notwithstanding subsection (1), any developer of a development area which has been completed on or before the commencement of this Act and has, immediately before that date, been collecting moneys from the purchasers for the maintenance and management of any building or land intended for subdivision into parcels and the common property comprised in the development area, may continue to do so until the joint management body is established, provided that all moneys shall be collected and dealt with by the developer in accordance with this Act.

(3) Any person who fails to comply with subsection (1) or (2) commits an offence and shall, on conviction, be liable to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

**[54]** Thus, any breach by AM-EL of either s 20 of Act 663 or s 13 of Act 757, has penal consequences the enforcement of which, however, is not within the province of the JMB or within the ambit of JMB's claims against AM-EL.

**[55]** It was contended that the monies collected by AM-EL were trust monies. In the Statement of Agreed Facts, AM-EL agreed that the maintenance charges and the sinking fund collected were trust monies for specific use. However, AM-EL never elaborated what that meant in the context of the JMB's claims, or for whom these monies were held in trust.

**[56]** Section 10(4) of Act 757 does provide that the monies collected by a developer and deposited into a maintenance account shall, inter alia, be held in trust for the purchasers. However, this provision relates to monies collected by a developer. AM-EL was not the developer. Furthermore, under Act 757, the term 'developer' is specifically defined under s 2 as:

'developer' —

(a) In relation to a development area, means any person or body of persons, by whatever name described, who develops any land for the purpose of residential, commercial or industrial use, or a combination of such uses; and

(b) In relation to a subdivided building or land, includes the original proprietor of the lot before the subdivision,

and includes the executors, administrators and successors-in-title and permitted assigns of such person or body of persons, and in a case where the person or body appointed by a court of competent jurisdiction to be the provisional liquidator or liquidator;

AM-EL clearly does not fall within the ambit of this definition and it was not contended otherwise.

**[57]** The JMB's claims against AM-EL were premised on allegations that the monies collected, being trust monies, were misapplied. They were wrongly given as loans to the first defendant, the husband of the third defendant and used for making payments for LAD owed to some of the purchasers.

**[58]** However, as stated above, these payments were during the time of the developer when AM-EL was merely its contractor. Payments made by the purchasers were to the developer but collected on the latter's behalf by AM-EL.

**[59]** Until the formation of the JMB, AM-EL continued to provide services to SRC upon payment by the purchasers. As for the SRCOA, there was no evidence that it took any steps to stop AM-EL from doing so. In fact, evidence was led that AM-EL did provide the maintenance services it was paid to provide. After all, the apartments in SRC were delivered quite some time ago in 1998. Maintenance and repairs would have been required in the intervening period of some 15 years before the JMB took over. However, there was also evidence that some purchasers were not satisfied with the services provided.

**[60]** It should be borne in mind that the monies collected by AM-EL, were collected before the JMB was even incorporated. Thus, the JMB could not possibly be the beneficiary of monies collected before its existence.

**[61]** If at all, the beneficiaries of the monies collected could be the purchasers who paid AM-EL. They however were not the claimants in, or parties to, Suit 524 or Suit 128 and they have also not been identified, or their payments proven by the JMB.

**[62]** In fact, not all the purchasers made payments to AM-EL. Who the purchasers were who paid and how much they paid, were never established. How much of what they had paid was utilised towards maintaining SRC and how much remained, were also not established. If at all, it would be the purchasers who paid AM-EL who would have any legal foundation to mount a claim against AM-EL in respect of the monies collected from them. In fact, however, whether those purchasers who had paid were still owners of or had sold off their properties was also not established.

**[63]** If there was any legal relationship in respect of the monies collected, it would be between the individual purchasers who paid and AM-EL. This relationship would be a contractual one. It would be for AM-EL to provide the

various services it did to SRC for the consideration paid by the purchasers who participated. Clearly, the JMB does not, and prior to its formation, could not have featured in this relationship. A

**[64]** At the heart of the JMB's claim was its aim to get at monies collected by the developer and by AM-EL from the purchasers for the maintenance and management of SRC. B

**[65]** Upon analysis, what the JMB seeks may be distinguished into: (a) the remainder of any monies collected by AM-EL from the purchasers; and (b) monies collected from purchasers that the JMB claims were misapplied. C

**[66]** Bearing in mind AM-EL is not the developer, there is no provision in any of the legislation that confers upon the JMB any right to pursue such claims against a third party such as AM-EL. D

**[67]** Section 22(1) of Act 663 provides that any surplus monies in the Building Maintenance Account shall be transferred to the JMB, when established, by the developer. Section 22(1) of Act 663 states as follows: E

> 22 Building Maintenance Fund
>
> (1) Any surplus moneys in the Building Maintenance Account after payment of all the expenditure which have been properly charged to the Building Maintenance Account shall be transferred to the Body *by the developer* not later than one month from the date of establishment of the Body, and such moneys shall constitute a fund to be known as the 'Building Maintenance Fund' which shall be maintained by the Body. (Emphasis added.) F

**[68]** There is a similar provision in Act 757. It is found in s 16(1), which states as follows: G

> 16 Balances not transferred shall vest in joint management body
>
> (1) If any balance of moneys in the maintenance account and in the sinking fund account has not been *transferred by the developer under paragraph 15(1)(a)*, the moneys shall vest in the joint management body on the date of the expiry of the developer's management period. (Emphasis added.) H

**[69]** Section 15(1)(a) of Act 757 states as follows:

> 15 Handing over by the developer to the joint management body
>
> (1) *A developer shall,* before the developer's management period expires — I
>
> (a) transfer all balances of moneys in the maintenance account and the sinking fund account, after payment of all the expenditure which have been properly charged to the accounts, to the joint management body; (Emphasis added.)

**[70]** The objective of s 22(1) of Act 663 and ss 15(1) and 16 of the Act 757, is sufficiently clear. They seek to ensure that surplus monies collected from purchasers are passed on to the JMB.

**[71]** However, they also expressly state that this is to be done by the developer. This obligation is specifically imposed on the developer manifesting Parliament's intention. The term 'developer' is also specifically defined in these legislation and they do not admit of an entity such as AM-EL.

**[72]** Section 22(1) of Act 663 and ss 15(1) and 16 of the Act 757 were not expressly extended to third parties like AM-EL, even though restrictions that would apply to AM-EL exist such as are provided in s 20 of Act 663 and s 13 of Act 757.

**[73]** Arguably, surplus monies collected by AM-EL for the maintenance of SRC appear to be within the objective and purpose of s 22(1) of Act 663 and s 15(1) of Act 757. However, to extend these provisions to surplus monies collected by third party contractors such as AM-EL, other than the developer as defined, would call for ignoring the plain words of these sections.

**[74]** There may well be a legislative lacuna. Nevertheless, it is not for the court to expand legislative provisions to include what it considers should be included despite the plain and express words of the legislation. Doing so would be usurping the role of the Legislature.

JMB'S CLAIM AGAINST THE FIRST, SECOND AND THIRD DEFENDANTS

**[75]** In the submissions of learned counsel for the JMB, references were made at great length to the developer's breaches of its obligations imposed on it, as a developer, under the Schedule H contracts, under Act 663 and under Act 757.

**[76]** They included the obligations to establish a joint management body, to convene a first meeting of the purchasers, to open a building maintenance account, to transfer surplus monies in the building maintenance account to the joint management body and that monies collected shall not form any part of the developer's property. These were all statutory provisions and obligations relating to and imposed on the developer qua developer, as defined.

**[77]** In its statement of claim in Suit 128, it was pleaded by the JMB that the defendants had been fraudulent in having caused the developer to appoint AM-EL to manage SRC. The reason this was done, learned counsel for the

JMB submitted, was so that the developer may avoid its obligations under the Schedule H contracts and the legislation mentioned. A

**[78]** The particulars of fraud delivered in the statement of claim were to the effect that the defendants had dissipated the funds collected from the purchasers by giving them as loans to the developer, the first defendant and the third defendant's husband and by using the funds to settle the developer's LAD liability. Also part of the alleged fraud were allegations of false accounting reports, failing to keep proper accounts, payments to upkeep vehicles of the defendants and a whole list of other allegations relating to the management and utilisation of the monies collected by AM-EL from the purchasers. B C

**[79]** As mentioned, the developer has long been wound up and was not a party to either Suit 524 or Suit 128. As such, in these two suits, the JMB sought to pierce the corporate veil of the developer and AM-EL and to seek to impose liability on the first, second and third defendants in their role as directors and shareholders. D

**[80]** In relation to the law's ability to 'pierce the corporate veil', much about this ability and when it may be deployed was made clear by Lord Sumption SCJ in his scholarly judgment in *Prest v Prest and others* [2013] 4 All ER 673, *sub nom Prest v Petrodel Resources Ltd and others* [2013] 2 AC 415. E

**[81]** In his analysis of the large and inharmonious case law on this topic, Lord Sumption made the following observation: F

> [16] ... 'Piercing the corporate veil' is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company.

Per Lord Sumption SCJ in *Prest v Prest and others* [2013] 4 All ER 673 at p 685. G

**[82]** The 'separate personality' that Lord Sumption spoke of is of course the principle that an incorporated company possesses a separate corporate personality of its own, a principle established in the decision of the House of Lords in *Salomon v A Salomon & Co Ltd* [1897] AC 22. H

**[83]** In his analysis of the body of case law, Lord Sumption SCJ identified two distinct principles associated with the concept of 'piercing the corporate veil' in para 28 at p 690 of the report. He coined these, the 'concealment principle' and the 'evasion principle' and elaborated as follows: I

> The *concealment principle* is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases

A the court is not disregarding the 'façade', but only looking behind it to discover the facts which the corporate structure is concealing. *The evasion principle* is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. (Emphasis added.)

**[84]** As an example of the concealment principle, the case of *Jones and Another v Lipman and Another* [1962] 1 All ER 442 was referred to in *Prest v Prest and others* [2013] 4 All ER 673. In *Jones and Another v Lipman and Another* [1962] 1 All ER 442, Mr Lipman sold his property to a company wholly owned and controlled by him in an attempt to render impossible an order for specific performance against him. This was an example of the concealment principle because the court looked beyond the corporate veil created by the company to see that it was in fact Mr Lipman behind it, or concealed by it. Having done so, the court ordered specific performance against Mr Lipman and also his company, to give effect to the order.

**[85]** *Gilford Motor Co Ltd v Horne* [1933] Ch 935 was cited as an example of both the concealment and the evasion principles. In order to evade a contractual obligation that precluded Mr Horne from being in a competing business, Mr Horne incorporated a company with his wife and another individual as its shareholders. At first instance the court found the contractual obligation, a restrictive covenant, to be void. The Court of Appeal however, allowed the appeal and granted an injunction against both the company and Mr Horne. The injunction granted against Mr Horne was in the view of Lord Sumption an example of the concealment principle. The corporate veil did not succeed in concealing Mr Horne as being the person actually carrying on the business of the company. The injunction against the company was, in the view of Lord Sumption, an example of the evasion principle. This was because the company was used by Mr Horne as a device to evade his personal contractual obligation.

**[86]** In both the principles, it can be seen that the court would not allow an individual or entity to evade or be concealed from a legal obligation or liability that the individual or entity bears, by hiding behind the veil of incorporation.

**[87]** What these two principles also point to is the fact that it is the individual or entity that bears the obligation or liability that the law seeks primarily to get at, not the corporation. As Lord Sumption explains, piercing of the corporate veil would only apply to, '… true exceptions to the rule in *Salomon v A Salomon & Co Ltd* [1897] AC 22 ie where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that

ownership and control'. In para 35 at p 694 of the report, Lord Sumption concluded:

> [35] I conclude that there is a limited principle of English law which applies *when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control*. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or the controller of the advantage that they would otherwise have obtained by the company's separate legal personality. (Emphasis added.)

**[88]** The judgment of Lord Sumption in *Prest v Prest and others* [2013] 4 All ER 673 was cited in a judgment of the Federal Court in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719 and also by the Court of Appeal in *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Berhad* [2014] 2 MLJ 518; [2014] 5 CLJ 851.

**[89]** Our courts have also approached the issue of piercing of the corporate veil in like manner as expressed by Lord Sumption in *Prest v Prest and others* [2013] 4 All ER 673. For example, in *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 at p 543; [1997] 1 CLJ 529 at p 537, Chong Siew Fai CJ (Sabah and Sarawak) delivering the judgment of the Federal Court stated as follows:

> We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, ie that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies — a principle firmly established since *Salomon v Salomon & Co* [1897] AC 22 (HL). However, since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus *in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.* (Emphasis added.)

**[90]** Thus, the concept of piercing the corporate veil is not employed for the purpose of *imposing* the liability of a corporate entity on the individuals behind it, ie the directors or shareholders, if they were not under any legal liability or obligation in the first place. To allow for this would have far reaching consequences. It could lead to directors or shareholders being personally liable every time there is a breach of contract on the part of the company, as the conduct of companies are necessarily based on the decisions or directions of individuals who manage and control it.

**[91]** The following is an important passage in the judgment of Lord Sumption in *Prest v Prest and others* [2013] 4 All ER 673 at pp 693–694 and warrants reproduction:

> [34] ... It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. *It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's*. On the contrary, that is what incorporation is all about. (Emphasis added.)

**[92]** Bearing the foregoing principles in mind, what the JMB seeks by piercing the corporate veil of AM-EL and also the developer, is what was clearly expressed in *Prest v Prest and others* [2013] 4 All ER 673 to be beyond the scope of the principle.

**[93]** Based on the Schedule H contracts, Act 663 and Act 757, the contractual and statutory obligations relied on by the JMB were all those of the developer. They were not legal obligations imposed upon the first, second or third defendants whether as shareholders, directors or otherwise, of either the developer or AM-EL.

**[94]** As those obligations were not those of the first, second or third defendants, it cannot be maintained that they had somehow sought to evade them by hiding behind the corporate veil of either the developer or AM-EL.

AM-EL'S COUNTERCLAIM AGAINST THE JMB

**[95]** By its counterclaim in Suit 128, AM-EL has sought to claim from the JMB, payments it received from the purchasers. It is difficult however, to see upon what basis such a claim could be justifiable.

**[96]** The relationship between AM-EL and the purchasers, if at all, would have been in contract. Failure on the part of any purchaser to make payment to AM-EL based on this contract would be a breach. This would result in a debt due from the purchaser to AM-EL.

**[97]** Even if the purchasers had made payment to the JMB monies that were payable to AM-EL, such payments would not discharge any debt owed by them to AM-EL. AM-EL's right to recover the sums payable to it would remain intact, if indeed there was such a debt owed in the first place.

**[98]** Counsel for AM-EL then sought to invoke the doctrine of unjust enrichment. It does not seem however, that this basis for AM-EL's counterclaim was pleaded.

**[99]** Notwithstanding the fact that unjust enrichment was not pleaded, this was also not a case of unjust enrichment. In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, the Federal Court speaking through Azahar Mohamed FCJ expressed the following:

> [117] The above passages from the judgments of the House of Lords are instructive and are significant contribution to the development of law of unjust enrichment. The principle underlying the cases of *Banque Financiere de la Cite v Parc (Battersea) Ltd* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:
>
> (a) the plaintiff must have been enriched;
>
> (b) the enrichment must be gained at the defendant's expense;
>
> (c) that the retention of the benefit by the plaintiff was unjust; and
>
> (d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.'

**[100]** Captured in clear terms, the essential ingredients that must exist are found in Azahar Mohamed FCJ's statement reproduced below:

> [119] Applying those principles, we now turn to consider whether the defendant has made out a cause of action in unjust enrichment: *the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, that the plaintiff's enrichment at the defendant's expense was unjust*, and whether there are any special defences to the claim. (Emphasis added.)

**[101]** It cannot be said that in the factual circumstances of this case, the JMB had been unjustly enriched at the expense of AM-EL. The JMB was merely collecting payment in order to carry out its function to, among other things, provide maintenance and management of the SRC. Its collection of payments from the purchasers was not at the expense of AM-EL. Whatever debt that may be owed by the individual purchasers to AM-EL, remains due and owing. It cannot be extinguished by payments made to the JMB.

## CONCLUSION

**[102]** Having regard to the foregoing, the court found that neither the JMB's claim in Suit 128 nor its counterclaim in Suit 524 was established. The court also found that AM-EL's counterclaim in Suit 128 was not established.

**[103]** Accordingly, the JMB's claim in Suit 128 and its counterclaim in Suit 524 were dismissed and AM-EL's counterclaim in Suit 128 was dismissed.

A **[104]** After hearing submissions by counsel on the issue of costs and having regard to the circumstances of this case, no order as to costs was made.

*All claims and counterclaims in both suits dismissed.*

B Reported by Izzat Fauzan

C

D

E

F

G

H

I